

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

JAMES RICHARD AYRE,

Petitioner,

Case Number: 5:06-CV-11327

v.

HON. JOHN CORBETT O'MEARA

WILLIE O. SMITH,

Respondent.

**OPINION AND ORDER (1) GRANTING PETITIONER'S MOTION TO LIFT STAY
AND REOPEN CASE, (2) REQUIRING RESPONSIVE PLEADING, AND
(3) DENYING MOTION FOR DEFAULT AND/OR SUMMARY JUDGMENT**

This is a habeas case under 28 U.S.C. § 2254. James Richard Ayre filed a habeas petition in 2006, challenging his convictions on three counts of possession of child sexually abusive material and use of a computer program, computer system or computer network to commit crime. Respondent filed a Motion to Dismiss on the ground that the petition presented claims that were not fully exhausted. The Court granted the motion, held the petition in abeyance, and administratively closed the case. The stay was conditioned upon Petitioner filing a motion for relief from judgment with the state trial court within sixty days from the date of the stay order and filing a motion to lift the stay and an amended petition in this Court within sixty days after the conclusion of the state court proceedings. Now before the Court is Petitioner's "Amended Petition for Habeas Corpus Relief and to Administratively Reopen the Above-Captioned Case," which the court construes as a motion to lift the stay, reopen the case, and allow filing of an amended petition. Also before the Court is Petitioner's Motion for Default and/or Summary Judgment.

Petitioner states that he has now exhausted his state court remedies by completing collateral review in state court. Petitioner filed a motion for relief from judgment in the trial court, which was denied. *People v. Ayre*, No. 03-1575-FH-B (Midland County Cir. Ct. May 12, 2008). Petitioner filed an application for leave to appeal in the Michigan Court of Appeals. The Michigan Court of Appeals denied leave to appeal on December 30, 2008. *People v. Ayre*, No. 287831 (Mich. Ct. App. Dec. 30, 2008). Petitioner then filed an application for leave to appeal in the Michigan Supreme Court, which denied leave to appeal on September 11, 2009. *People v. Ayre*, No. 138630 (Mich. Sept. 11, 2009). Petitioner then returned to this Court moving for the stay to be lifted and the case to be reopened.

Petitioner filed his motion for relief from judgment and his motion to lift stay within the sixty days prescribed in the Court's Stay Order. The Court, therefore, will grant Petitioner's motion, lift the stay, and permit filing of the amended petition.

Also before the Court is Petitioner's Motion for Default and/or Summary Judgment. Petitioner seeks default or summary judgment on the ground that Respondent has not filed a response to his amended petition. Prior to issuance of this Order, the Court had not required a response. Therefore, Respondent has not failed to comply with any Court Order. Therefore, the Court denies the motion.

For the forgoing reasons, **IT IS ORDERED** that Petitioner's motion to administratively reopen the habeas proceeding [dkt. # 22] is **GRANTED** and the amended petition is accepted for filing.

IT IS FURTHER ORDERED that the Clerk of the Court reopen this matter and serve a copy of the Amended Petition [dkt. # 22] and a copy of this Order on Respondent and on the

Attorney General for the State of Michigan as provided in Rule 4, Rules Governing Section 2254 Cases.

IT IS FURTHER ORDERED that Respondent file an answer responding to the allegations of the petition in accordance with Rule 5, Rules Governing Section 2254 Cases, within **sixty days** from the date of this Order.

IT IS FURTHER ORDERED that Petitioner's Motion for Default and/or Summary Judgment [dkt. #24] is **DENIED**.

s/John Corbett O'Meara
United States District Judge

Date: June 1, 2010

I hereby certify that a copy of the foregoing document was served upon the parties of record on this date, June 1, 2010, using the ECF system and/or ordinary mail.

s/William Barkholz
Case Manager